

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEROY EUGENE WASHINGTON, JR.,

Defendant-Appellant.

UNPUBLISHED
October 13, 2000

No. 203254
Genesee Circuit Court
LC No. 96-054726-FC

Before: Gribbs, P.J., and Neff and O'Connell, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony (felonoy-firearm), MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant as a second habitual offender, MCL 769.10; MSA 28.1082, to a term of forty to sixty years' imprisonment for the second-degree murder conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first argues that the trial court erred in denying his motions for a mistrial. The grant or denial of a motion for mistrial is within the sound discretion of the trial court. Reversal is not warranted absent a showing of prejudice to the defendant's rights. *People v Vettese*, 195 Mich App 235, 245-246; 489 NW2d 514 (1992). A mistrial should be granted only when the error committed is so egregious that no other remedy exists to eliminate the prejudicial effect. *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992). The trial court's ruling must be so grossly in error as to deprive the defendant of a fair trial or amount to a miscarriage of justice. *Vettese*, *supra* at 245-246.

Here, the trial court's cautionary instruction cured any prejudice stemming from the spectator's outburst in the courtroom. Further, Josephine Doss' comments about her nephew's funeral were unresponsive to the prosecutor's otherwise proper questioning. A mistrial is generally not warranted where the remarks are unresponsive and the prosecutor did not play a role in encouraging the witness to provide the response. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990); *People v Taylor*, 159 Mich App 468, 489; 406 NW2d 859 (1987). The court also gave a cautionary instruction regarding Doss' unresponsive remarks which in our view was sufficient to cure any prejudice that the remarks caused. Finally, defendant has not shown that the prosecutor's remarks during closing

argument warranted a mistrial. The remark about defendant being a “cancer” in the neighborhood was responsive to defense counsel’s remarks during closing argument and, viewed in this context, was not so prejudicial that a mistrial was required. See *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

Next, defendant complains that he was denied a fair trial because of prosecutorial misconduct. However, apart from the portions of the prosecutor’s closing argument that defendant addressed in his motion for a mistrial, defendant did not preserve the alleged incidents of misconduct with an appropriate objection in the trial court. We review these unpreserved matters to determine whether a plain error affected defendant’s substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Defendant has the burden of demonstrating that the claimed errors prejudiced him, i.e., that they affected the outcome of trial. Additionally, if such an error is shown, this Court should not reverse unless the defendant is actually innocent or the error seriously affected the fairness, integrity or public reputation of the judicial proceedings. *Id.*

Defendant argues that the prosecutor improperly impeached witness Glenn Gray with his prior unarmed robbery conviction. A conviction for unarmed robbery involves an element of theft and, therefore, may be used to impeach a witness under MRE 609(a)(2). See *People v Cross*, 202 Mich App 138, 146-147; 508 NW2d 144 (1993); *People v Brasic*, 171 Mich App 222, 231; 429 NW2d 860 (1988). Further, the conviction in question was less than ten years old and was therefore subject to admission under MRE 609(c). Consequently, defendant has not shown that the admission of the conviction constituted plain error.

Next, while the record contains several references to witnesses having prior criminal records and having been incarcerated for unrelated matters, the witnesses volunteered most of the challenged testimony. Further, viewed in context, much of the testimony was relevant to issues in this case, such as to explain how certain witnesses learned that defendant had been charged in this case and to explain delays in coming forward with information. Moreover, none of the references tended to disclose that defendant had a prior criminal record or was incarcerated apart from his awaiting trial in this matter. Accordingly, defendant has not shown that any error affected his substantial rights. *Carines, supra* at 774.

We also disagree with defendant that the prosecutor engaged in misconduct in soliciting evidence that (1) witnesses feared for their safety as a result of testifying or implicating defendant, and (2) defendant’s brother did not appear for a police interview. Defendant has not demonstrated that the evidence in question was improper or that bad faith motivated the prosecution with regard to such evidence. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999); *People v Missouri*, 100 Mich App 310, 328-329; 299 NW2d 346 (1980).

We also reject defendant’s argument that the prosecutor personally vouched for the credibility of his witnesses. Our review of the record does not support defendant’s argument. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Nor do we find any merit to defendant’s claims that the prosecutor improperly referred to matters not in evidence, or appealed to the jurors’ sense of civic duty. Rather, the prosecutor limited his comments to the evidence and reasonable inferences that could be

drawn from the evidence to support his theory of the case. *Id.* at 284. Also, his comments about evidence and witnesses who were not produced did not shift the burden of proof to defendant when those comments related to the theories that the defense had previously advanced. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995); *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998).

Defendant next asserts that the admission of Deborah Nelson's prior inconsistent statement constituted error. Because defendant did not object to this evidence at trial, appellate relief is precluded absent a showing of plain error affecting defendant's substantial rights. *Carines, supra* at 774. Mrs. Nelson's statement was admissible as substantive evidence under MRE 801(d)(1)(C). See *People v Malone*, 445 Mich 369, 375-378; 518 NW2d 418 (1994). See also MRE 613(b). Moreover, defendant does not assert that the prosecutor improperly urged the jury to consider the statement as substantive evidence, and the trial court instructed the jury on the limited use of impeachment evidence. We conclude, therefore, that defendant has not demonstrated plain error affecting his substantial rights. *Carines, supra* at 774.

With respect to defendant's next argument, he has not shown that the trial court's remedy for a claimed discovery violation amounted to an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). After reviewing the record, we agree with the trial court that the prosecutor's failure to produce earlier the bail bond receipt used to impeach Glenn Gray's testimony did not prejudice defendant.

Defendant also contends that the prosecutor presented bad acts evidence without complying with the notice requirements of MRE 404(b). Defendant did not preserve this issue with an appropriate objection at trial. The evidence of defendant's gambling, fighting, use of weapons, and destruction of car tires all involved events surrounding and leading up to the commission of the crime in question and, therefore, was independently admissible as part of the *res gestae* of the offense without regard to MRE 404(b). *People v Sholl*, 453 Mich 730, 740-742; 556 NW2d 851 (1996); *People v Coleman*, 210 Mich App 1, 5; 532 NW2d 885 (1995). Therefore, defendant has not demonstrated plain error in connection with this unpreserved issue. *Carines, supra* at 774.

Defendant challenges the prosecutor's examination of Fortina Harris regarding his statements to a defense investigator. According to defendant, the prosecutor attempted to bolster Harris' identification testimony. Defendant did not object to the challenged testimony. In light of the identification testimony that various other witnesses provided, we conclude that any error was harmless.

We find no merit to defendant's claims of instructional error, and so we discuss them only briefly. Defendant did not request a special instruction on identification testimony and we find nothing in *People v Franklin Anderson*, 389 Mich 155; 205 NW2d 461 (1973), to support's defendant claim that a special instruction was required in this case. Also, the court instructed the jury on "reasonable doubt" in accordance with CJI2d 3.2(3), as defendant requested, and that instruction adequately conveyed the concept of "reasonable doubt" to the jury. *People v Snider*, 239 Mich App 393, 420-421; 608 NW2d 502 (2000); *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999).

Finally, viewed as a whole, the court's jury instructions regarding manslaughter and evaluating defendant's state of mind were not unduly confusing.

Defendant also argues that reversal is required because he was denied effective assistance of counsel. In order to prevail on this issue, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced him that he was denied his right to a fair trial. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish prejudice, defendant must show the existence of a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different. *Id.* Defendant must also overcome the presumption that the challenged action was a matter of trial strategy, *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), and the burden is on defendant to establish factual support for his claim of ineffective assistance of counsel, *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Here, defendant did not make a testimonial record at the trial court level in support of his various claims of ineffective assistance of counsel. Accordingly, appellate relief is precluded unless the record contains sufficient detail to support defendant's claims. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).

Limiting our review to the record, defendant has not shown that defense counsel committed any serious errors that affected the outcome of the trial. Defendant first argues that his counsel was ineffective for failing to call any alibi witnesses. The court below noted that defendant withdrew this argument during the hearing on his motion for a new trial. Based on defendant's withdrawal, we deem the issue waived for appellate review.

Defendant next argues that defense counsel was ineffective for not moving to strike from the record all references that witnesses Tim Baker and Glenn Gray had been incarcerated. We do not conclude that the outcome of this case would have been different had defense counsel moved to strike the references from the record.

We concluded earlier in this opinion that the other acts evidence that the prosecutor presented was part of the *res gestae* of the offense. Therefore, even if defense counsel had objected to its admission, the objection would have been unsuccessful. For the same reason, we also reject defendant's argument that his trial counsel was ineffective for failing to object to the court's instructions to the jury and request a special instruction regarding identification testimony. We further presume that defense counsel's decision not to call an expert to testify about the unreliability of identification testimony was a matter of trial strategy. *Cooper, supra* at 658. After reviewing the balance of defendant's remaining claims of ineffective assistance of counsel, we conclude that they are without merit.

Defendant also argues that the trial court erred in denying his motion for a new trial based on newly discovered evidence. We review a trial court's decision whether to grant or deny a new trial based on newly discovered evidence for an abuse of discretion. However, the trial court's factual findings made in connection with such a motion are reviewed for clear error. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). To warrant a new trial based on newly discovered evidence, a defendant is required to "show that the evidence (1) is newly discovered, (2) is not merely

cumulative, (3) would probably have caused a different result, and [(4)] was not discoverable and producible at trial with reasonable diligence.” *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). Here, the trial court determined that defendant’s witnesses were neither newly discovered nor credible, and that a different result would not have been probable if the witnesses had testified at trial. After conducting our own review of the record, we agree with the trial court and conclude that it did not abuse its discretion in denying defendant’s motion.

Based on the foregoing, we reject defendant’s claim that he is entitled to a new trial based on the cumulative effect of the alleged errors.

Affirmed.

/s/ Roman S. Gribbs

/s/ Janet T. Neff

/s/ Peter D. O’Connell